No. 8044.

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

ELECTRICAL RESEARCH PRODUCTS INC.,
a corporation,
*Plaintiff-Appellant,*

*against*

W. D. GROSS,
*Defendant-Appellee.*

## APPELLANT'S BRIEF.

R. E. ROBERTSON,
*Attorney for Plaintiff-Appellant.*

JOHN H. RAY,
H. H. BRELAND,
*Of Counsel.*



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## Authorities Cited.

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### Statement.

This is an appeal by the plaintiff from a judgment of the District Court of the United States for the Territory of Alaska, Division Number One (Hon. George F. Alexander, Judge), in favor of the defendant for $58,436.33 (the amount of the jury's verdict against the plaintiff upon defendant's counterclaims), and also for $7,500 allowed by the Court as defendant's attorney's fee (pp. 123-8*).

* All page references are to the "Transcript of Record" unless otherwise indicated.

The action is in replevin to recover possession of certain talking motion picture equipment which the plaintiff had installed in the defendant's theatres in Juneau and Ketchikan, Alaska, and licensed the defendant to use in those theatres. This equipment was taken by the Marshal under the writ of replevin at the beginning of the action and turned over to the plaintiff, after the defendant had failed to re-bond it or claim a return thereof (pp. 311-315).

The ground upon which the action was based was that plaintiff was entitled to the possession of the equipment because the defendant had defaulted in the payment of sums which he owed the plaintiff under the terms of the license contracts. The substance of the defense was that the defendant owed the plaintiff nothing at the time the action was begun; that the plaintiff, therefore, had no right to replevy the equipment; and that the defendant had a right to counterclaim for damages alleged to have been caused him by the wrongful replevin. Defendant also counterclaimed for sums claimed to have been paid the plaintiff under duress, prior to plaintiff's alleged wrongful replevin.

The jury's verdict was in favor of the defendant, awarding him damages alleged to have resulted from the plaintiff's replevin of the equipment and also awarding him the sums which he claimed to have paid the plaintiff under duress.

## The Pleadings.

The amended complaint (hereinafter referred to as the "complaint") contains two identical causes of action, except that one was to recover the equipment at Juneau; while

the other was to recover the equipment at Ketchikan. The gist of each cause of action is that plaintiff was entitled to the possession of the equipment because defendant had failed and refused to pay $1219.75 due under the terms of the contract, with respect to each theatre, for "inspections and minor adjustments" made by the plaintiff (pp. 3, 9); and had also failed and refused to pay $29.09, in the case of the theatre at Juneau, and $61.92, in the case of the theatre at Ketchikan, due for additional equipment furnished to the defendant by the plaintiff (pp. 7, 13-14).

The substance of defendant's amended answer (hereinafter referred to as the "answer") is, briefly, as follows: The original contracts between the parties did not obligate the defendant to pay for inspections and minor adjustment services by the plaintiff. Any alleged subsequent agreement by the defendant to pay for these services was void for lack of consideration and also because it was obtained by duress. Plaintiff's wrongful replevin of this equipment damaged the defendant who counterclaims for those damages and also for sums he claims to have paid the plaintiff under duress.

Defendant's third and sixth affirmative defenses, based upon plaintiff's alleged violation of the Anti-trust Laws, were withdrawn on the trial (p. 315).

## Undisputed Facts.

The following facts appear from the undisputed evidence at the trial:

On March 28, 1929, plaintiff and defendant entered into two contracts, identical in their terms, except that one related to defendant's theatre at Juneau, Alaska, and the

other related to defendant's theatre at Ketchikan, Alaska (pp. 170-188). By these contracts, plaintiff agreed to install certain patented talking motion picture equipment in defendant's theatres and licensed the defendant to use such equipment in those theatres for ten years. Thereafter, plaintiff duly installed this equipment in defendant's theatres—at Juneau on May 20, 1929, and at Ketchikan in the middle of June, 1929 (pp. 318-19).

The contracts (which were printed forms, p. 188) contained the following provisions:

> "Instruction and inspection service.
>
> 4. * * * * * * * * * * * * * * *
>
> "Products* also agrees to make periodical inspection and minor adjustments in the Equipment after it shall have been installed.
>
> * * * * * *
>
> "Service inspection charge.
>
> 6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the 'Service Day' and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products regular schedule of such charges as from time to time established. Under Products' present schedule, the service and inspection payment shall be $..... per week, which charge shall not be exceeded during the first two years of the period of said license and there-

* Throughout these contracts, the plaintiff is referred to as "Products".

after for the balance of the term of said license shall not exceed the sum of $..... per week."

* * * * * *

"Payment for parts, etc.

8. The Exhibitor agrees to pay to Products its installation charges as from time to time established for any additional equipment or spare or renewal parts, furnished or supplied by Products, upon delivery thereof and to pay the transportation charges thereon."

On September 4, 1929, plaintiff's Comptroller, Anderson (who had executed the original contracts of March 28, 1929 on behalf of the plaintiff), wrote the defendant two identical letters, except that one related to the theatre at Juneau and the other to the theatre at Ketchikan (pp. 189-91). A copy of the letter relating to the Juneau theatre is as follows (pp. 189-90):

"Electrical Research Products Inc.
Acoustic Department
250 West 57th Street
New York, N. Y.

subsidiary of
Western Electric Company
Incorporated

September 4, 1929 [126]

Mr. W. D. Gross,
Coliseum Theatre,
Juneau, Alaska.

Dear Sir:

Referring to our agreement with you dated March 28, 1929, for the installation and use of Western Electric Sound Equipment in the Coliseum Theatre at Juneau, Alaska—

This agreement was executed with the provision left blank relating to weekly service payments, in order that the amount thereof might be later determined.

It is proposed that this provision of the agreement be now made definite, and that in order to give effect thereto, the above mentioned agreement be modified by striking out paragraph 6 thereof (which, as above stated, was left blank as to the amount of the charge) and inserting in lieu thereof the following:

> 6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term shall be payable on the Saturday next succeeding the 'Service Day' and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such payment shall be in accordance with Products' regular schedule of such charges for theatres in Alaska from time to time established. Under Products' present schedule, the service and inspection payment shall be $29.75 per week, which charge shall not be exceeded, provided, however, that the Exhibitor agrees to reimburse Products for any extra expense incurred by Products because of the use of airplane or other extraordinary means of transportation incurred in connection with emergency service units.

Will you kindly indicate your acceptance of the above by signing and returning to us one copy of this letter.

Very truly yours,

(Signed) R. E. Anderson,
Comptroller."

In December, 1929, defendant signed these letters beneath the word "Accepted", written at their foot (pp. 28, 55) and left them in the office of plaintiff's Seattle representative. At that time, defendant also paid the accrued service and inspection charges computed from the date of the installation of the equipment at $29.75 per week and continued to pay these charges at that rate through May 24, 1930. He made no payments for service and inspection rendered after that date, although regularly billed therefor and repeatedly urged to pay (pp. 298-9).

On the trial, plaintiff introduced in evidence the testimony of its service men to the effect that they made "periodical inspection and minor adjustments in the equipment," until shortly before this action was begun. This evidence was uncontradicted. Indeed, defendant's witnesses admitted that plaintiff's service men made such inspection and minor adjustments. The Manager of defendant's theatres testified that plaintiff's engineer, Knowlton, made a "thorough inspection"; that he remembered all the other inspection men and had "gone over all these inspection reports" and "checked them carefully to see what these men did, and none of them reported doing anything other than inspection and minor adjustments; *these engineers, from first to last, did nothing except making inspections and minor adjustments*" (p. 673). (Italics ours.)

Plaintiff also showed, at the trial, that it furnished defendant with additional equipment and parts for which there was due and unpaid $91.09 at the beginning of this action (pp. 298-9). This evidence was wholly uncontradicted by the defendant.

The contracts of March 28, 1929, provided that title to this equipment should remain at all times in plaintiff (p. 179) and that it should have the right of repossession in the event of defendant's failure to pay any sums due under the contract (pp. 182-3).

Plaintiff's demand for this equipment and defendant's refusal thereof are admitted (Answer, par. VIII, pp. 25, 52-3).

The equipment at Juneau was replevied on April 20, 1931 (p. 314) and at Ketchikan on April 28, 1931 (p. 311). With only one day's shut down at Juneau (p. 353), defendant continued to operate both his theatres with other equipment which he bought, until May 1, 1933, when he leased his theatres to one Shearer (pp. 363, 367).

## Specification of Errors.

The following are the errors which the appellant asserts and intends to urge upon this appeal:

1. The Court erred in instructing the jury as follows (Court's instruction No. 2, p. 994):

> "And in this connection, I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts [of September 4, 1929] the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929, it cannot recover for such services."

2. The Court erred in instructing the jury as follows (Court's instruction No. 7, p. 1005):

"And in this connection, I instruct you that the said agreements [of March 28, 1929] or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment services."

3. The Court erred in refusing to give plaintiff's requested instruction No. 2, as follows (pp. 975-6):

"You are instructed that the plaintiff claims that the amount to be paid for inspection and minor adjustment services was left in blank in paragraph six of each of the contracts of March 28th, 1929, plaintiff's exhibits Nos. 1 and 3, because the amount thereof could not be determined at the time that those two contracts were made and that it was understood between plaintiff and defendant that the amount of that weekly charge should be fixed at a later date.

"In this connection I instruct you, even though the amount of the weekly charge for inspection and minor adjustment services was left in blank in those original contracts, that does not mean that those services were to be rendered by plaintiff free; but the amount thereof to be paid by defendant may be shown by other evidence to have been agreed upon by the parties. The plaintiff alleges that the amount to be paid for such services was agreed upon between it and the defendant and that it was to be $29.75 per week for each theatre and plaintiff further alleges that this agreement was expressed in the supplemental contracts of September 4th, 1929, plaintiff's exhibits Nos. 2 and 4."

4. The Court erred in instructing the jury as follows (Court's instruction No. 3, pp. 996-7):

"In this connection I instruct you that under the original agreement of March 28th, 1929, no agent or employee of the plaintiff is authorized to alter or modify those agreements or either of them in any way, unless such alteration or modification shall be approved in writing by the president or vice-president of the plaintiff corporation, or by such representative as may from time to time be designated in writing by either of such officers; and I instruct you further that there is no evidence that these alleged contracts were approved by either of such officers. There is before you, however, evidence to the effect that 'Anderson' had authority to effect certain contracts for and on behalf of plaintiff, and that said contracts were later ratified and confirmed by the plaintiff by its Board of Directors. I therefore instruct you that these alleged agreements of September 4th, 1929, have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the parties afterward voluntarily ratified these agreements."

5. The Court erred in refusing to give plaintiff's requested instruction No. 3, as follows (pp. 976-7):

"The defendant claims that under the original contracts of March 28th, 1929, plaintiff's exhibits Nos. 1 and 3, no agent or employee of the plaintiff corporation is authorized to alter or modify these contracts, or either of them, in any way unless such alteration or modification shall be approved by the president or a vice-president of the plaintiff corporation or by such representative as may from time to time be designated in writing by either of such officers.

"You are instructed that the plaintiff has submitted evidence tending to show that R. E. Ander-

son did have authority from the plaintiff corporation to execute the supplemental contracts of September 4th, 1929, plaintiff's exhibits Nos. 2 and 4, for and on its behalf and that his action in making these supplemental contracts was authorized and approved by the plaintiff corporation through its board of directors, and if you believe this evidence to be true then the requirements of the original contracts relative to altering or modifying them, have been complied with."

6. The Court erred in overruling the plaintiff's demurrer to the second and fourth counterclaims for failure to state facts sufficient to constitute a counterclaim to the amended complaint herein (pp. 77, 79).

7. The Court erred in denying plaintiff's motion to strike out section (d) of paragraph 3 of the First and Fourth affirmative defenses in Defendant's Amended Answer, as Amended, upon the ground that the allegations of said section were irrevelant, incompetent and immaterial (p. 168).

8. The Court erred in refusing to give plaintiff's requested instruction No. 13, as follows (pp. 977-8):

"You are instructed that under Section 8 of each of the contracts of March 28, 1929, plaintiff's exhibits Nos. 1 and 3, the defendant agreed to pay to plaintiff its list installation charges as from time to time established for any additional equipment and spare or renewal parts, furnished or supplied by plaintiff, upon delivery thereof and to pay the transportation charges thereon.

"You are instructed that the evidence in this case shows that the plaintiff pursuant to that sec-

tion of those contracts furnished and supplied defendant at his Juneau theatre with the additional equipment and spare or renewal parts described in the first cause of action in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of $29.09, and furnished and supplied to defendant at his Ketchikan theatre additional equipment and spare or renewal parts described in the second cause of action mentioned in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of $61.92, and that no evidence has been offered by the defendant tending to show that those amounts were paid by him to plaintiff at the time of the commencement of this action or since whereas plaintiff offered evidence that said amounts had not been paid and that the same were due at the time of the commencement of this action."

9. The Court erred in instructing the jury as follows (Court's instructions Nos. 8 and 10, which instructions were identical except No. 8 referred to the Juneau Theatre and first counterclaim and No. 10 to the Ketchikan Theatre and third counterclaim):

> "* * * in this connection I instruct you that it is admitted by the plaintiff that the rental value of the equipment so taken out is $1,050.00 per year [for each theatre] and that the amount to be fixed by you, if you find the defendant entitled to recover for such rental value, cannot be less than $8,458.30 [for each theatre], together with 8% interest thereon from and after the date that such equipment was removed; and that the amount to be allowed by you

on this item cannot be more than $9,627.03 [for each theatre] (p. 1006).

* * * * * *

"I further instruct you that if you find that the defendant is entitled to recover on his first [and third] Counter Claim[s] to the first [and second] Cause[s] of Action, he may recover, in addition to the rental value of the equipment as above referred to, the profits, if any, lost by him from the operation of his Juneau [and Ketchikan] Coliseum theatre[s] because of the removal of said equipment; (p. 1006):

* * * * * *

"I further instruct you that the total amount of anticipated profits that can be recovered by the defendant under the first [and third] counterclaims to the first [and second] Cause[s] of action cannot be more than $44,000.00 [under each counterclaim]; that being the amount fixed by the pleadings of the defendant (p. 1008).

* * * * * *

"He [defendant] claims to have installed new equipment for the purpose of reducing the damages that would otherwise result from the removal of the equipment. If you find that he is entitled to recover because of the removal of such equipment in the Coliseum theatre[s] at Juneau [and Ketchikan] under these instructions, then you may allow him whatever money you may find he has actually paid out in connection with the purchase and installation of such new equipment; provided, that such monies were paid out in a reasonable and prudent attempt, made in good faith to diminish such damages as under these instructions are held to be recoverable; and he is entitled to recover such monies

even though the installation of such new machinery or equipment did not result in reducing such damages; provided, that the defendant acted in good faith and for the purposes above stated'' (p. 1009).

10. The Court erred in refusing to give plaintiff's requested instruction No. 18B, as follows (p. 979):

> ''You are instructed that you cannot consider, in ascertaining the amount of such net useable value, any good will or alleged loss thereof because I have heretofore stricken from this case all matters dealing with the question of good will and loss thereof, and, further, you cannot consider any alleged loss of profits in arriving at the amount of the net useable value of said equipments during said periods because the defendant has failed to prove with definiteness and certainty that he lost any profits at either of his said theatres.''

11. The Court erred in refusing to give plaintiff's requested instruction No. 22, as follows (p. 979):

> ''You are further instructed that you cannot allow defendant any damages on account of the purchase or cost of installation of new equipments in either of his said theatres because that is not an element of the true measure of damages in this case.''

12. The Court erred in admitting in evidence, over the objection and exception of the plaintiff, certain testimony of defendant, W. D. Gross, the full substance of which is as follows (pp. 361-2):

> ''Q. What did you do in the way of trying to remedy the sound and make it better?
>
> A. Tried some other equipment; we borrowed some better equipment—after—and couldn't do it any good.

Q. What effect did that have on your business?

Mr. ROBERTSON: Objection as incompetent, irrelevant and immaterial.

The COURT: Overruled. I think the question is competent; he may answer.

Mr. ROBERTSON: Exception.

Q. Now, Mr. Gross, what effect, if any, did the fact that you had inferior equipment in your theatre have upon the business of the theatre?

Mr. ROBERTSON: May I ask that my objection be considered as going to all this line of testimony?

The COURT: Very well.

A. Lost business. It began to go down, lost business.

* * * * * *

"The effect upon the profits was that I considered I lost from about two to three thousand dollars a month in Juneau and the same in Ketchikan."

## Summary of Appellant's Argument.

The appellant submits that the judgment appealed from should be reversed upon any one of the following grounds:

I. The Court erroneously instructed the jury, in effect, that defendant owed plaintiff nothing for service charges and that plaintiff could not recover in this action upon the ground of defendant's failure to pay such charges.

II. The Court erroneously refused plaintiff's requested instruction that at the commencement of this action defendant owed $91.01 for additional equipment furnished by the plaintiff.

III. The Court erroneously instructed the jury that the alleged agreements of September 4, 1929 "have no binding force or effect" unless "you find the parties afterwards voluntarily ratified these agreements."

IV. The Court erroneously denied plaintiff's motion to strike out the allegations of duress from defendant's first and fourth affirmative defenses as irrelevant and immaterial.

V. The Court erroneously overruled plaintiff's demurrer to the second and fourth counterclaims for monies alleged to have been paid to the plaintiff under duress.

VI. The Court erroneously instructed the jury as to the measure of defendant's damages.

## POINT I.

**The Court erroneously instructed the jury, in effect, that defendant owed plaintiff nothing for service charges and that plaintiff could not recover in this action upon the ground of defendant's failure to pay such charges.**

In its charges to the jury, the Court quite properly outlined the issues in this action as follows (p. 992):

> "In an effort to further clarify the issues for you I might say that the plaintiff in this case bases its right to recover generally—on each of its causes of action—on two things:
>
> First: That defendant is indebted to it on account of so-called 'service charges' which it alleges to be due and unpaid.
>
> Second: That defendant is indebted to it for additional equipment and spare and renewal parts furnished and delivered which it alleges are also past due and unpaid."

Having thus stated the two grounds upon which the action was based, the Court then proceeded to strike out the first ground completely by instructing the jury as follows (p. 994):

> "And in this connection I further instruct you that if you believe from the evidence that at the time of the execution of these alleged contracts the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28th, 1929, it cannot recover for such services";

The only thing the jury could possibly "believe from the evidence", was the admitted and unquestionable fact that "at the time of the execution of these alleged contracts of September 4, 1929, the plaintiff was already legally bound to render the defendant periodical inspection and minor adjustment services, under the contracts of March 28, 1929." Those contracts expressly so provided, as follows (pp. 175-6):

> "Products [plaintiff] also agrees to make periodical inspection and minor adjustments in the equipment after it shall have been installed."

This language in the contracts of March 28, 1929 meant, as a matter of law, that the plaintiff was "legally bound to render the defendant periodical inspection and minor adjustment services under the contracts of March 28, 1929," and the jury could not believe anything else. Hence in telling the jury that if they believed this, the plaintiff "cannot recover for such services," the Court really directed a verdict for the defendant, insofar as plaintiff's case was based upon defendant's failure to pay for those services.

Moreover, this instruction was clearly erroneous. What possible reason was there for barring plaintiff's recovery because it was "already legally bound" to render these services? The only explanation of this extraordinary ruling of the Court's is found in its subsequent instruction to the jury as follows (p. 1005):

> "And in this connection, I instruct you that said agreements [of March 28, 1929] or either of them, do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment."

In other words, the Court's ruling was based upon this theory: the contracts of March 28, 1929, did not require the defendant to pay for these services. Hence, if plaintiff was legally bound by these contracts to render these services, it was bound to do so free of charge; and if it was bound to render these services free, defendant's alleged subsequent agreement of September 4, 1929, to pay $29.75 per week for these services was void for lack of consideration and the plaintiff, therefore, cannot recover for such services.

We submit that the theory just stated is clearly erroneous, since the contracts of March 28, 1929, *did* require the defendant to pay for these services and plaintiff was *not* legally bound by their terms to render such services free. These contracts expressly provided as follows (pp. 175, 177):

> "Instruction and inspection service.
>
> 4. * * * * * * * * * * * * * * *
>
> "Products also agrees to make periodical inspection and minor adjustments in the Equipment after it shall have been installed.
>
> * * * * * *
>
> "Service inspection charge.
>
> 6. In addition to any other payments required to be made by the Exhibitor hereunder, the Exhibitor agrees to pay Products throughout the term of the license hereby granted a service and inspection payment, payable weekly, which, for the first two weeks of said term, shall be payable on the Saturday next succeeding the "Service Day" and thereafter throughout the balance of said term on each and every Saturday in advance. The amount of such

> payment shall be in accordance with Products regular schedule of such charges as from time to time established. Under Products' present schedule, the service and inspection payment shall be $..... per week, which charge shall not be exceeded during the first two years of the period of said license and thereafter for the balance of the term of said license shall not exceed the sum of $..... per week."

What can the above language mean except that plaintiff was to make "periodical inspection and minor adjustments" and defendant was to pay plaintiff for such services a "service and inspection payment * * * in accordance with Products' [plaintiff's] regular schedule of such charges"? To say, as the Court did, that the above provisions "do not require the defendant Gross to pay the plaintiff for periodical inspection and minor adjustment" is, we submit, directly opposed to the express language of these provisions.

True, the last sentence of paragraph 6, quoted above, contained unfilled blanks and was, therefore, meaningless. However, that could not possibly affect the remaining provisions of the paragraph. Leaving these blanks in this printed form of contract unfilled merely had the effect of eliminating this sentence from the contract as meaningless and unenforceable. However, this no more affected the other provisions of this paragraph than leaving blank a provision in the judgment (as was done, in the case at bar, p. 127), affected the remaining provisions of the judgment.

Apparently, defendant's contention is, that the "service and inspection payment" which defendant agreed to pay, in paragraph 6 of the contracts of March 28, 1929 (p. 177), was a payment, not for the "periodical inspec-

tion and minor adjustments'' which plaintiff agreed to make, in paragraph 4 of these same contracts (p. 175), but for an entirely different ''service''; and that mere ''periodical inspection and minor adjustments'' were to be made by the plaintiff without a separate charge therefor.

This contention of the defendant's is, we submit, clearly unsound. The only ''service'' which plaintiff anywhere agreed to render was the ''periodical inspection and minor adjustments'' provided for in paragraph 4. Hence, defendant's agreement, in paragraph 6, to pay a ''service and inspection payment'' was necessarily an agreement by him to pay for plaintiff's ''periodical inspection and minor adjustments,'' that being the only ''service'' which plaintiff had agreed to render and hence the only service to which this ''service and inspection payment'' could possibly refer.

We therefore submit that the Court committed reversible error in its instructions above referred to and emphasized that error by refusing the following instruction requested by plaintiff (p. 976):

> ''In this connection, I instruct you, even though the amount of the weekly charge for inspection and minor adjustment services was left in blank in those original contracts, that does not mean that those services were to be rendered by plaintiff free; but the amount thereof to be paid by defendant may be shown by other evidence to have been agreed upon by the parties.''

## POINT II.

**The Court erroneously refused plaintiff's requested instruction that at the commencement of this action, defendant owed $91.01 for additional equipment furnished by the plaintiff.**

As seen above, this action was based upon two grounds: first, that defendant was indebted to plaintiff for unpaid service charges; and, second, that defendant was indebted to plaintiff for additional equipment and parts. As also seen above, the Court, in effect, struck the first ground out of the case, leaving plaintiff's right of recovery hanging solely upon defendant's indebtedness for additional equipment. This sole remaining ground of recovery fared little better at the Court's hands.

On the trial, plaintiff proved by uncontradicted, documentary evidence that it furnished additional equipment and parts to the defendant; that the defendant received, and receipted for, this equipment; and that there was due and unpaid, when this action was begun, $29.09 for such equipment furnished at Juneau and $61.92 for such equipment furnished at Ketchikan (pp. 297-310). Although the defendant and his accountants took the stand, this evidence of defendant's indebtedness and failure to pay was undisputed.

If plaintiff had so requested, it would have been entitled to a directed verdict in its favor because of this undisputed evidence. However, the plaintiff did not request a directed verdict but asked merely for the following instruction (pp. 977-8):

> "You are instructed that under Section 8 of each of the contracts of March 28, 1929, plaintiff's exhibits

Nos. 1 and 3, the defendant agreed to pay to plaintiff its list installation charges as from time to time established for any additional equipment and spare or renewal parts, furnished or supplied by plaintiff; upon delivery thereof and to pay the transportation charges thereon.

"You are instructed that the evidence in this case shows that the plaintiff pursuant to that section of those contracts furnished and supplied defendant at his Juneau theatre with the additional equipment and spare or renewal parts described in the first cause of action in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of $29.09, and furnished and supplied to defendant at his Ketchikan theatre additional equipment and spare or renewal parts described in the second cause of action mentioned in plaintiff's amended complaint herein and that there was due and unpaid thereon at the time of the commencement of this suit a balance of $61.92, and that no evidence has been offered by defendant tending to show that those amounts were paid by him to plaintiff at the time of commencement of this action or since whereas plaintiff offered evidence that said amounts had not been paid and that the same were due at the time of the commencement of this action."

The Court refused the above requested instruction (p. 978). This, we submit, was error. Not only did the Court nowhere else give the substance of this requested instruction but, on the contrary, the instruction which the Court did give on this matter was extremely confusing, if not actually erroneous. The instruction given was as follows (No. 5½-b, pp. 1002-3):

> "If you find from a fair consideration of all the evidence in this case that the contract of September 4, 1929, exhibit '2', relative to the Juneau theatre, was fairly executed between the two parties and that the plaintiff performed the services as contemplated by said contract relative to the Juneau theatre, or furnished additional equipment and spare and renewal parts to defendant pursuant to said contract of March 28th, 1929, and if you further find that at the time of the commencement of this action the defendant was indebted to the plaintiff in any amount either for any such service or for any such additional equipment or renewal or spare parts, then plaintiff had the lawful right to bring this action and to remove from the defendant's Juneau theatre all of plaintiff's sound reproducing equipment, including all such, if any, additional equipment and spare and renewal parts; and your verdict should be that plaintiff was on April 20th, 1931, and now is, entitled to the possession of said equipment."

We submit that the meaning of the foregoing instruction is, to say the least, obscure and confusing. Does the plaintiff's right to recover for the additional equipment depend, under the above instruction, on whether the "contract of September 4, 1929 * * * was fairly executed"? If so, the instruction was clearly erroneous, since, admittedly, the contracts of September 4, 1929 related in no way to additional equipment but only to service charges (pp. 189-90).

Whatever the meaning of the foregoing instruction was, it did not clearly instruct the jury that, regardless of plaintiff's right to recover for service charges, it was entitled to recover in this action if the jury believed plaintiff's undisputed evidence as to the additional equipment.

Although the amounts due for additional equipment and parts, at the time this action was begun, were small ($91.01), the provision of the contracts of March 28, 1929, is clear that the defendant was in default upon his failure or refusal "to pay any of the items or sums herein agreed to be paid" (p. 180) and that the plaintiff had the right of repossession in the event of defendant's failure to pay any sums due under the contract (p. 182). The defendant not only does not question the validity of these provisions but, on the contrary, asserts that the contracts containing them are "in full force and effect" and have "never been modified, rescinded or revoked" (pp. 26, 53).

We therefore submit that the Court's refusal of plaintiff's requested instruction, quoted above, was error.

## POINT III.

**The Court erroneously instructed the jury that the alleged agreements of September 4, 1929 "have no binding force or effect" unless "you find the parties afterwards voluntarily ratified these agreements."**

The defendant contended, on the trial, that the agreements of September 4, 1929 were not binding upon him because they were not binding on the plaintiff, not having been executed by plaintiff's President or Vice President or one authorized in writing by these officers, as required by Section 20 of the contracts of March 28, 1929 (pp. 186-7). The Court adopted this contention of the defendant's and so instructed the jury, with the single qualification that if "you find the parties afterwards voluntarily ratified these agreements," then they were valid. The Court's instruction on this point is as follows (No. 3, pp. 996-7):

> "The plaintiff claims that the original contracts of March 28, 1929, were mutually modified by the execution of two new or supplemental agreements under date of September 4th, 1929.
>
> "It is then alleged that the defendant agreed by these alleged supplemental agreements to pay a weekly service charge of $29.75 under each contract. In opposition to this claim the defendant maintains in the first place, that these alleged contracts of September 4th, 1929, were not executed by the parties at all, in that they were not signed by the plaintiff corporation, and in that the name of the plaintiff corporation does not occur in the body of the instruments.
>
> "In this connection I instruct you that the alleged contracts are signed by one 'Anderson' who

signed the same as 'Comptroller' without further describing himself, and that the question of whether said 'Anderson' was acting for himself or for the plaintiff corporation is a question of fact to be determined by you under the evidence and these instructions.

"In this connection I instruct you that under the original agreement of March 28th, 1929, no agent or employee of the plaintiff is authorized to alter or modify these agreements or either of them in any way, unless such alteration or modification shall be approved in writing by the president or vice-president of the plaintiff corporation, or by such representative as may from time to time be designated in writing by either of such officers; and I instruct you further that there is no evidence that these alleged contracts were approved by either of such officers. There is before you, however, evidence to the effect that 'Anderson' had authority to effect certain contracts for and on behalf of plaintiff, and that said contracts were later ratified and confirmed by the plaintiff by its Board of Directors. I therefore instruct you that these alleged agreements of September 4th, 1929, have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the parties afterwards voluntarily ratified these agreements."

It will be observed that under the Court's ruling, just quoted, these contracts of September 4, 1929 were invalid unless the *defendant,* as well as the plaintiff, ratified these agreements, the Court's instruction being that these contracts were void unless "the parties afterwards voluntarily ratified these agreements."

We submit that the foregoing instruction was erroneous. In the first place, if ratification by either party was necessary, in order to render these contracts valid, it was only plaintiff's ratification, and not defendant's, that was necessary. The provision in the contracts of March 28, 1929, that any "alteration or modification shall be approved in writing by the president or a vice-president or by such representative as may from time to time be designated in writing by either of such officers" (p. 186) was clearly inserted in these contracts for the sole benefit of the plaintiff and no waiver or ratification of such waiver by the defendant was necessary. It was therefore error for the Court to tell the jury that the plaintiff could not recover on these contracts unless the defendant as well as the plaintiff ratified them after they were executed.

In the second place, no ratification by either party was necessary if, in fact, Anderson had authority to sign these contracts for the plaintiff at the time he did so. The theory of the Court's instruction that a contract cannot be altered by an officer duly authorized by the Board of Directors to make such alteration, if the contract forbids such alteration, is clearly unsound. All that is necessary to change a contract, including a provision in it expressly forbidding such change, is the consent of both parties to the contract. It is legally impossible for parties to make a binding agreement that they shall not change the contract or shall change it only in a certain specified way. As said in *Blair* v. *National Reserve Insurance Co.*, 199 N. E. 337, 338 (Mass. Supreme Judicial Ct.):

> "A long line of decisions in this Commonwealth establishes the general rule that provisions or con-

> ditions in an insurance policy which by their terms cannot be altered or waived except by certain specified officers or agents or in certain specified ways, as in writing or by endorsement on the policy, are integral parts of the policy and until revoked or modified in some legally recognized manner are valid and binding upon the insured. * * * Nevertheless, it is recognized, even in cases which illustrate the general rule, that the Company cannot contract itself out of the legal consequences of its subsequent acts. *It necessarily follows that it remains legally possible for the Company, by duly authorized action, to destroy the special protection originally set up in its favor in any manner which is sufficient in law to bring about that result, whether or not the method adopted is in accord with the terms of the original agreement.* It is the rule as to contracts in general that parties cannot tie up by contract their freedom of dealing with each other." (Italics ours.)

So, in the case at bar, if, in fact, Anderson was authorized by the plaintiff to make these agreements of September 4, 1929 (as he unquestionably was, p. 192), they became binding on the plaintiff immediately upon their execution by him, as its authorized official, even though he was not the one designated in the original contracts of March 28, 1929; and "ratification" was wholly unnecessary.

Similarly, in *Polk* v. *Western Assurance Co.,* 90 S. W. 397, 398-9 (Mo. Court of Appeals):

> "But parties who have the power to make a contract have the power to unmake or modify it regardless of self-imposed limitations, and notwithstanding they insert in their written contract an agreement expressed in the strongest terms, prohibiting

> its alteration except in a particular manner, they may, by a subsequent agreement based upon a sufficient consideration, modify their contract in any manner they choose."

In *Peabody* v. *Interborough Rapid Transit Co.*, 202 N. Y. Supp. 287, Judge Lehman (now a member of the New York Court of Appeals) said (p. 290):

> "While parties to a contract may provide that the contract cannot be changed without certain formalities, they may themselves waive these formalities, and it would be paradoxical to hold that parties who are free agents may by agreement create obligations towards each other which by agreement they cannot also dissolve."

We therefore submit that it was reversible error for the Court to tell the jury, as it did, that "these alleged agreements of September 4, 1929 have no binding force or effect unless they were executed and approved in accordance with said provisions of the original contracts, unless you find the parties afterwards voluntarily ratified these agreements," (p. 997). If, as the evidence clearly shows (p. 192), Anderson was authorized by plaintiff's Board of Directors to execute these contracts of September 4, 1929, the plaintiff was bound by them immediately upon their execution by the parties, irrespective of any subsequent ratification.

Not only did the Court erroneously instruct the jury as stated above but when plaintiff's counsel requested the following instruction to correct that error, it was refused by the Court (pp. 976-7):

> "The defendant claims that under the original contracts of March 28th, 1929, plaintiff's exhibits

Nos. 1 and 3, no agent or employee of the plaintiff corporation is authorized to alter or modify these contracts, or either of them, in any way unless such alteration or modification shall be approved by the president or a vice president of the plaintiff corporation or by such representative as may from time to time be designated in writing by either of such officers.

"You are instructed that the plaintiff has submitted evidence tending to show that R. E. Anderson did have authority from the plaintiff corporation to execute the supplemental contracts of September 4th, 1929, plaintiff's exhibits Nos. 2 and 4, for and on its behalf and that his action in making these supplemental contracts was authorized and approved by the plaintiff corporation through its board of directors, and if you believe this evidence to be true then the requirements of the original contracts relative to altering or modifying them, have been complied with."

## POINT IV.

**The Court erroneously denied plaintiff's motion to strike the allegations of duress from defendant's first and fourth affirmative defenses as irrelevant and immaterial.**

Section (d) of defendant's first and fourth affirmative defenses (pp. 29-31, 56-58) consists solely of allegations that the alleged contracts of September 4, 1929, are void for duress. Plaintiff moved to strike this section from both defenses upon the ground that it was irrelevant and immaterial (p. 168). The Court denied this motion (p. 168). We submit that this was error.

Assuming, for argument's sake, that defendant's signature to the agreements of September 4, 1929, was obtained, as he claims, by duress, that fact would not be a defense to this action. If the agreements of September 4, 1929, are void for duress, then the original agreements of March 28, 1929, are in full force and effect, as defendant not only admits but strenuously asserts in both these affirmative defenses (par. II, pp. 26, 53). Under those agreements (which are expressly made part of these defenses, pp. 26, 53), defendant owes precisely the same amount as under the alleged agreements of September 4, 1929. By the agreements of March 28, 1929, defendant was obligated to pay "in accordance with Products' [plaintiff's] regular schedule for such charges, as from time to time established." (p. 177). Under this provision, the right to establish this "regular schedule of such charges" was solely in the plaintiff. Defendant's agreement to this schedule was not at all necessary in order for it to be binding upon him.

He had already agreed, by the admittedly valid contracts of March 28, 1929, to pay whatever price plaintiff should establish from time to time as its "regular schedule of charges."

What was plaintiff's "regular schedule of such charges", at the time in question? Clearly, under the very allegations of these defenses themselves, it was $29.75 per week—the amount fixed by Products' letters of September 4, 1929 to the defendant, which letters are incorporated in these defenses (pp. 27-28). Even if these letters do not constitute valid contracts because defendant's signature to them was obtained by duress, they are, nevertheless, perfectly competent evidence to show what plaintiff's regular schedule of such charges was at this time. These letters recite on their face, as follows (p. 28):

> "The amount of such payment shall be in accordance with Products' regular schedule of such charges for theaters in Alaska as from time to time established. *Under Products' present schedule, the service and inspection payment shall be $29.75 per week,* * * *". (Italics ours.)

If these letters of September 4, 1929 are not contracts, they, nevertheless, establish the amount of plaintiff's regular schedule of charges for periodical inspection and minor adjustment services which defendant bound himself to pay by the terms of the contracts of March 28, 1929.

We, therefore, submit that the allegations of duress in section (d) of the first and fourth affirmative defenses are wholly irrelevant and immaterial and constitute no defense. This is obviously so, in so far as plaintiff's cause of action is based upon defendant's indebtedness for the

additional equipment and parts furnished, since defendant does not, and could not, claim that this indebtedness was in any way incurred under duress. It is equally so, we submit, as to plaintiff's claim based upon defendant's failure to pay service charges; for even if defendant's agreements of September 4, 1929, to pay $29.75 per week for these services, are void for duress, defendant is still bound in the same amount by the contracts of March 28, 1929, obligating him to pay plaintiff's "regular schedule of such charges," which regular schedule was shown to be $29.75 per week by the very documents which defendant attacks.

The Court's error in not striking from the case this wholly irrelevant matter of duress was inevitably prejudicial to the plaintiff, in the extreme. A large part of the evidence introduced by the defendant on the trial, and much of the Court's charge to the jury, related to this false issue and necessarily injured the plaintiff's cause with the jury, not only by permitting them to put their verdict for defendant upon this immaterial ground, but also by inflaming them against the plaintiff's case, even on the material issues.

## POINT V.

**The Court erroneously overruled Plaintiff's demurrer to the second and fourth counterclaims for monies alleged to have been paid to the plaintiff under duress.**

That these counterclaims are improper in this replevin action is clear from the provisions of the Alaska Code relating to counterclaims. Those provisions are as follows (Sec. 3422, Alaska Code of Civil Procedure):

> "*Nature of counterclaim, and how stated.* The counterclaim mentioned in this chapter must be one existing in favor of the defendant and against a plaintiff, between whom a several judgment might be had in the action, and arising out of the following causes of action:
>
> "First. A cause of action arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim.
>
> "Second. In an action arising on contract, any other cause of action arising also in contract, and existing at the commencement of the action."

The briefest examination of these counterclaims clearly shows that they do not fall within the provisions of the above Statute. The gist of these counterclaims is, that long prior to plaintiff's replevin of this equipment, the defendant was forced to pay certain monies to the plaintiff under threats of financial ruin if he did not make such payments. Each counterclaim expressly alleges that "defendant had

not contracted to pay'' these sums sought to be recovered (pp. 45, 72). Hence these counterclaims are not causes of action ''arising out of the contract or transaction set forth in the complaint as the foundation of the plaintiff's claim.''

The cause of action upon which plaintiff's claim was based was the wrongful detention of plaintiff's property after plaintiff had become entitled to its repossession. This wrongful detention occurred long after the defendant had made the payments, which he sought to recover by these counterclaims, and long after the alleged acts of duress occurred. There was, then, no connection whatsoever between defendant's alleged payments under duress, upon which these counterclaims were based, and defendant's alleged wrongful detention of plaintiff's property, upon which the complaint in this action was based.

True, the complaint in this action asserted rights growing out of the contracts under which the property in question was placed in defendant's possession; but these counterclaims in question do not assert any rights under these contracts. On the contrary, both counterclaims expressly allege that the payments which they sought to recover were sums ''which defendant had not contracted to pay'' (pp. 45, 72) and hence could not possibly ''arise out of the contracts'' set forth in the complaint.

Similarly, the second ground of counterclaims provided for in the Statute, quoted above, does not exist here, since this is not ''an action arising on contract'' nor are these counterclaims actions arising in contract. It is well settled that a replevin action sounds in tort, for the wrongful refusal of the defendant to surrender possession of the

property sought to be replevied, even though plaintiff's right to repossession grows out of the contract between the parties. As said by the Oregon Supreme Court in *McGargar* v. *Wiley,* 229 Pac. 665, 667-8, in construing identical provisions in the Oregon Statute, and in reversing a judgment for the defendant because of an improper counterclaim:

> "As the defendant, until his default in payment, was rightfully in possession of the automobile, it was necessary for the plaintiffs to demand possession of it in order to render his subsequent possession unlawful. After demand and refusal by the defendant to surrender possession of it plaintiffs became entitled to maintain an action in replevin to recover the possession of the automobile. The cause of action alleged in the complaint as the foundation of plaintiff's claim was defendant's wrongful refusal, upon demand, to surrender the possession of the automobile to the plaintiffs, and his subsequent wrongful detention of it. This refusal by defendant and his subsequent detention of the automobile was a clear violation of the legal right of the plaintiffs to the possession of the automobile, and gave to the plaintiffs the clear right to bring an action to recover the possession of it.
>
> "Assuming that the facts alleged in defendant's counterclaim are sufficient to constitute a cause of action in favor of the defendant and against the plaintiff, and that if sustained by proof these allegations would entitle the defendant to recover therefor, the question is, is he entitled to plead these matters, either as a defense or as a counterclaim, to the cause of action alleged in the complaint, or must he seek his remedy by an independent action? It must be obvious that the cause of action for the wrong complained of by the plaintiffs, namely, de-

fendant's wrongful detention of their automobile, is not one arising on contract, but is based on tort, and therefore the defendant is not entitled to allege as a counterclaim in an action brought to recover the possession of the automobile a cause of action arising on contract under either subdivision 1 or 2 of section 74. Hence if entitled to set forth these matters as a counterclaim it can only be for the reason that the cause of action set forth in the counterclaim is one arising out of the transaction set forth in the complaint as the foundation of plaintiffs' claim. The transaction set forth in the complaint as the foundation of plaintiffs' claim is the wrong committed by the defendant in the detention, without legal right, justification, or excuse of plaintiffs' automobile. The transaction set forth in the counterclaim is the alleged wrong committed by the plaintiffs in making false representations and in the breach of a warranty, resulting in damages to the defendant. Between the transaction set forth in the complaint and the transaction set forth in the counterclaim there is no legal connection whatsoever. They are entirely separate and distinct from each other, and the wrongs complained of in the counterclaim do not arise from the transaction alleged in the complaint. They preceded the transaction alleged in the complaint, and are wholly unrelated to it, and hence the matters alleged in the counterclaim do not constitute a counterclaim, within the meaning of the Code."

We, therefore, submit that defendant's second and fourth counterclaims were improper in this action of replevin and that plaintiff's demurrer to these counterclaims was erroneously overruled by the Court.

## POINT VI.

**The Court erroneously instructed the jury as to the measure of defendant's damages.**

The Court instructed the jury that if plaintiff wrongfully replevied the equipment in question, the defendant could recover three separate items of damages therefor: (1) the rental value of the replevied equipment for the unexpired portion of the ten-year license period provided for in the contracts of March 28, 1929; (2) the profits which defendant lost because of plaintiff's removal of the equipment; and (3) the cost of the new equipment with which defendant replaced the equipment removed (Instructions Nos. 8 and 10, pp. 1005-9, 1010-14). In accordance with these instructions, the jury's verdict in favor of the defendant awarded him (1) $9,000 as the rental value of the equipment in each theatre; (2) $19,440 for lost profits at Juneau and $12,320 for lost profits at Ketchikan; and (3) $2,628.92 the cost of the new equipment installed in each theatre in place of the equipment removed (pp. 113-14).

We submit that these instructions of the Court's were erroneous in the following respects:

A. The jury was permitted to award double damages;

B. The jury was permitted to award damages for lost profits which were wholly speculative and conjectural.

Let us briefly consider these errors in the Court's instructions.

**A. The jury was permitted to award double damages.**

That a party who has been deprived of the use of property cannot recover both the rental value of that property and the profits that would have been made in the use of the property, is clearly settled. In the "Restatement of the Law of Contracts" by the American Law Institute, the following rules are laid down (Vol. 1, §331, p. 515):

> "Degree of Certainty Required in Establishing the Amount of Profits and Losses:
>
> "*Alternative Methods.*
>
> "(1) Damages are recoverable for losses caused or for profits and other gains prevented by the breach only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty.
>
> "(2) Where the evidence does not afford a sufficient basis for a direct estimation of profits, but the breach is one that prevents the use and operation of property from which profits would have been made, damages may be measured by the rental value of the property or by interest on the value of the property." (Italics ours.)

In other words, the recovery of lost profits and the recovery of "rental value" are "alternative methods" of computing damages. To award damages computed by both methods is to allow double damages. In *Woodring* v. *Winner National Bank,* 227 N. W. 438 (South Dakota Supreme Court), it was expressly held that one who had been deprived of the use of property could not recover both the value of such use (the "rental value") and also the lost profits. The Court said (p. 440):

> "According to the testimony on behalf of plaintiffs, they were deprived of possession for 35 days and their average profits would have been $15 a day. Under the evidence loss of profits did not exceed $525. The value of the use and occupancy of the premises and tools was said to be $50 a week. *The profits could only be realized by using the premises and tools, so that it is clear that plaintiffs would not be entitled to recover both for loss of profits and for use and occupancy of the premises and tools.*" (Italics ours.)

Similarly, in *Bowen* v. *Harris,* 59 S. E. 1044 (North Carolina Supreme Court), it was held, in an action for wrongful seizure of plaintiff's property, that plaintiff could not recover both lost profits and also the value of the use, or rental value, of the property. The Court said (p. 1047):

> "And it may be well here to note that, if the jury should award plaintiff damages on the basis of the profit he could have made during the time his work was necessarily interrupted, he should not have, in addition, the direct damage arising from a fair value for the loss of the use of the teams, because, in the event suggested, the use of the teams is required in making the alleged profit. He can recover for the value of the use of the teams—this is direct damages—but both should not be allowed."

We, therefore, submit that it was reversible error for the Court to instruct the jury that it could award the defendant his lost profits "in addition to the rental value of the equipment" (pp. 1006-7).

**B. The jury was permitted to award damages for lost profits which were wholly speculative and conjectural.**

The Court instructed the jury that they could award the defendant "the profits, if any, lost by him from the operation of" his theatres (pp. 1006-7, 1011). The Court also refused plaintiff's requested instruction that "the defendant had failed to prove with definiteness and certainty that he lost any profits" (p. 979). Under these rulings of the Court, the jury rendered a verdict which contained items of damages totaling $31,760 for "loss of profits to the defendant by reason of the removal of the equipment" (pp. 113, 114).

We submit that the evidence as to profits was so speculative and conjectural that the Court should not have submitted any question of profits to the jury. What was that evidence? Although occupying the larger part of the Record, it may be briefly summarized as follows:

> When plaintiff removed its equipment from defendant's theatres, defendant replaced that equipment with other equipment, which, although the best then obtainable, was inferior in sound quality to plaintiff's equipment. During the two years from approximately June 1, 1929 to May 1, 1931, while plaintiff's equipment was in defendant's theatres, defendant operated those theatres at an average monthly profit of $2,000.52 at Ketchikan and $864.15 at Juneau. During the period after plaintiff's equipment had been removed, from approximately May 1, 1931 to May 1, 1933, defendant operated those theatres at an average monthly loss of $187.70 at Ketchikan and $489.98 at Juneau, whereupon defendant leased both theatres to one Shearer who, shortly thereafter, removed the equipment then in these thea-

> tres and replaced it with plaintiff's equipment, similar to that originally installed and subsequently removed by the plaintiff. During the eighteen months immediately following the re-installation of plaintiff's equipment in these theatres, Shearer, the lessee, operated the Ketchikan theatre at an average monthly profit of $629.70 and the Juneau theatre at an average monthly loss of $267.62.

In other words, defendant's case for lost profits was this: "My theatres made money in 1929-31, with the use of plaintiff's equipment. They lost money in 1931-33 with the use of other and inferior equipment. Hence my loss of profits was caused by the removal of plaintiff's equipment."

We submit the following contentions, in this connection:

> (1) Defendant wholly failed to show that plaintiff's removal of its equipment caused defendant any loss of profits.
>
> (2) Defendant wholly failed to show the amount of such loss, if any, caused by the removal of plaintiff's equipment.

**(1) Defendant wholly failed to show that plaintiff's removal of its equipment caused defendant any loss of profits.**

It is well settled that lost profits cannot be recovered unless both the fact and the amount of such loss is established by something more than speculation or conjecture. As said by the Circuit Court of Appeals for the Eighth Circuit in *Homestead Co.* v. *Des Moines Electric Co.,* 248 Fed. 439, 445-6:

> "It is true that the general rule is that the expected profits of a commercial business are gener-

> ally too remote, speculative, and uncertain to sustain a judgment for their loss. But there is an exception to this rule, to the effect that the loss of profits from the destruction, interruption, or depression of an established business may be recovered, if the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. *It is true that the proof must pass the realm of conjecture, speculation, or opinion not founded on facts, and must consist of actual facts, from which a reasonably accurate conclusion regarding the cause and the amount of the loss can be logically and rationally drawn.''* (Italics ours.)

The removal of plaintiff's equipment in April, 1931 (pp. 311-15) could not have caused the defendant any loss of profits unless it caused a decrease in the number of persons attending defendant's theatres. Hence, unless there was some evidence tending to show that this decrease was because plaintiff's equipment was no longer there, the court erred in allowing the jury to award the defendant any lost profits. We submit that there was no such evidence and that defendant's own evidence showed that the decrease in attendance at his theatres began prior to the removal of plaintiff's equipment and continued thereafter at substantially the same rate.

Under the evidence, as the case went to the jury, the decrease in attendance at defendant's theatres in May, 1931-33 might have been caused by any one of many equally possible causes, other than the removal of the plaintiff's equipment. Let us enumerate but a few.

(a) The financial and economic depression, of which the Court properly took judicial notice (pp. 1016-17) and which, under the evidence, was at its worst during this period of

1931-33 (pp. 845-6) was, of course, one of the causes of the decrease in attendance at defendant's theatres. There was no evidence, and could have been none, showing that this decrease was not due to the depression or to what extent it was due to other possible causes. The situation is somewhat similar to that in *Willis* v. *S. M. H. Corporation,* 259 N. Y. 144, where the plaintiff had been employed to solicit new members for a Club under an agreement that he should receive, as compensation, a percentage of the purchase price of stock which he sold to those members. After he had obtained many new members and sold them much stock, he was wrongfully discharged. Meanwhile, the economic depression intervened. The Court held that no recovery for anticipated profits could be had, since the intervening depression, among other things, rendered those profits wholly conjectural. The Court said (pp. 147-8):

> "Those damages are purely conjectural. The number of members obtained by the plaintiff before his discharge forms no basis for an inference that thereafter he would have obtained other members who would pay a substantial amount. * * *, *it is impossible to estimate the influence of an intervening economic depression* as an obstacle to the solicitation of new members * * *". (Italics ours.)

The Court accordingly reversed the judgment insofar as it awarded anticipated profits estimated upon the basis of past profits.

(b) Another probable cause of the decrease in attendance at defendant's theatres in May, 1931-33, was the entry of competitors into this field. When defendant installed plaintiff's equipment in his theatres, in 1929, there were no other theatres in Alaska exhibiting talking motion pictures

(p. 469). In January, 1931, however, the Capitol Theatre opened at Juneau under new management, completely renovated, and with new sound equipment (p. 760). In April, 1932, the Revilla Theatre opened at Ketchikan, likewise completely renovated, and with new sound equipment (pp. 842-3). Both these theatres immediately became active competitors of the defendant (pp. 840-1) and made money (pp. 844, 410-29). To say that, notwithstanding this competition, the attendance at defendant's theatres would not have decreased in May, 1931-33, if plaintiff's equipment had remained in them, is plainly against all reason and business experience.

(c) Still another possible cause of the decrease in attendance at defendant's theatres may have been the type of pictures which defendant exhibited in his theatres after plaintiff's equipment was removed, as compared with the pictures which he exhibited before the removal of that equipment. While defendant testified that he always got the "best pictures in the United States" (p. 471), there was no testimony as to the popular appeal or drawing power of the pictures exhibited after the removal of plaintiff's equipment, as compared with those exhibited before. That the chief drawing power of a theatre lies in the particular pictures which it exhibits was admitted by the manager of defendant's theatres (pp. 759-60).

Since the removal of plaintiff's equipment from defendant's theatres was, at most, only one of many equally possible causes of the decreased attendance at those theatres, the Court should not have permitted the jury to guess that such removal did, in fact, cause a decrease in attendance and should have withdrawn all question of lost profits from the jury's consideration.

Not only did defendant fail to prove that the removal of plaintiff's equipment caused the decrease in attendance at his theatres but his own documentary evidence showed the contrary. For instance, in July, 1929, with plaintiff's equipment in defendant's theatres, the box office receipts at Juneau were $6,308.40 (p. 578). In July, 1930, with plaintiff's equipment still in these theatres, the box office receipts at Juneau dropped to $4,295.50 (p. 598). In July, 1931, after plaintiff's equipment had been removed, the box office receipts at Juneau were $2,813.72 (p. 614).

Similarly, at Ketchikan, the box office receipts for July, 1929, with plaintiff's equipment in this theatre, were $6,234.07 (p. 485); in July, 1930, with plaintiff's equipment still in, the box office receipts dropped to $4,821.25 (p. 506); in July, 1931, after plaintiff's equipment had been removed, the box office receipts were $2,957.80 (p. 520).

These figures, taken from defendant's own exhibits at the trial, show that a marked decrease in attendance at defendant's theatres began long before plaintiff's equipment was removed and that such decrease was no greater after the removal than before. Then, what possible basis was there for the Court's permitting the jury to find that the cause of the decrease in attendance at defendant's theatres was the removal of plaintiff's equipment?

Annexed to this brief, as appendices "A" and "B" (p. 54), are tabulations of figures taken from defendant's exhibits and showing comparative box office receipts at these theatres during the entire period in question. These figures show a progressive decline in box office receipts at both theatres in 1930, long before plaintiff's equipment had been removed. Hence the jury's inference, upon which its verdict necessarily rested, that the decline in box office re-

ceipts was caused by the removal of plaintiff's equipment is not only unsupported by any evidence but conflicts with the figures given by the defendant himself, showing that for months after plaintiff's equipment was removed, the decline in box office receipts proceeded at no greater rate than it had already been doing before the removal of such equipment.

Furthermore, defendant's own witnesses not only failed to establish that the removal of plaintiff's equipment caused a decrease in attendance at defendant's theatres but, on the contrary, expressly stated that they continued to attend defendant's theatres after the removal of plaintiff's equipment just as they had done before. Typical of this evidence was the testimony of defendant's witness McKinnon who said (p. 821):

> "I live in Juneau; lived in Alaska nearly fifty years; I have known where the Coliseum Theatre was ever since it was built; I attended it during 1929, 1930, 1931, 1932 and 1933; I remember hearing of when the equipment was taken out of that theatre, but I don't remember the date; *I used to go there right along both before and after;* maybe once, sometimes twice a week." (Italics ours.)

With such testimony by defendant's own witnesses, and with no testimony that anybody ever stayed away from defendant's theatres because plaintiff's equipment was no longer in there, what possible legal basis was there for the jury's guess that the removal of plaintiff's equipment caused the defendant to lose profits which he would have made if plaintiff's equipment had remained?

True, the defendant was allowed to testify, over plaintiff's objection and exception, that the "effect" of the in-

ferior sound equipment used by him, after the removal of plaintiff's equipment, was that he "lost business—two or three thousand dollars a month" (p. 362); but this mere opinion or conclusion of the witness, based upon no facts, was, we submit, erroneously admitted. Furthermore, this conclusion of the defendant's was completely destroyed by his own further testimony that five other theatres of his in Alaska, all equipped with this same "inferior" sound equipment, made a profit during the very period that these theatres at Juneau and Ketchikan were said to be losing money because of this inferior equipment (pp. 471-2).

**(2) Defendant wholly failed to show the amount of his loss of profits, if any, caused by the removal of the plaintiff's equipment.**

Let us now assume, for argument's sake, that the removal of plaintiff's equipment did cause the defendant *some* loss of profits. There still remains, however, the question whether there was any evidence sufficient to permit the jury to estimate the *amount* of those lost profits. It is well settled that there must be evidence, not only of the *fact* of loss, but also of the *amount* of such loss. As said in *Central Coal & Coke Co.* v. *Hartman,* 111 Fed. 96, 98 (8th C. C. A.):

> "* * * the loss of profits from the destruction or interruption of an established business may be recovered *where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was*" (Italics ours).

To the same effect is *Homestead Co.* v. *Des Moines Electric Co.,* 248 Fed. 439, in which the Court (8th C. C. A.) said (p. 446):

> "It is true that the proof must pass the realm of conjecture, speculation or opinion not founded on facts and must consist of actual facts, from which a reasonably accurate conclusion regarding *the cause and the amount* of the loss can be logically and rationally drawn" (Italics ours).

Was the amount of the jury's verdict for lost profits ($19,440 for Juneau (p. 113) and $12,320 for Ketchikan, p. 114) based upon any evidence of amount which was not mere speculation? The only evidence of such amount was the average monthly profits during the two years while plaintiff's equipment was in defendant's theatres and the average monthly losses during the two years after plaintiff's equipment had been removed (pp. 791-6). This evidence was, we submit, wholly insufficient to permit the jury to render any verdict for lost profits, since defendant's business of exhibiting talking motion pictures (which had only just been invented) was new and fluctuated so widely over the short period in question that it was wholly impossible to estimate future profits upon the basis of past profits, especially in view of the intervening depression.

At the time of the removal of plaintiff's equipment, in April, 1931, defendant's business of exhibiting talking motion pictures was less than two years old (pp. 318-19). At first, he had no competition, his theatres being the only ones in all Alaska exhibiting talking motion pictures (p. 469). Apparently, he encountered no serious competition until the opening of the Capitol Theatre at Juneau on January 15, 1931 (p. 760) near the end of this two-year period. Obviously, the profits made during this period of less than two years were no evidence upon which to base any estimate of future profits to be made, if at all, under fundamentally different and adverse conditions. As said

by Judge Wilbur, while on the Supreme Court of California, in *Friedman* v. *McKay Leather Co.,* 178 Pac. 139, where a discharged sales agent sought to recover lost profits on future sales based upon the amount of his past sales for only a few months (p. 140):

> "In the instant case, as to the damage suffered by the plaintiffs by reason of the refusal to further recognize them as agents, *the profits to be realized as commissions on purely suppositive sales were under the circumstances too speculative to justify a recovery.*" (Italics ours.)

Under the authorities, evidence of past profits is no evidence at all of future profits unless the business in question is a long-established one, with comparatively stable and uniform earnings over a long period of time. As said in the leading case of *Central Coal & Coke Co.* v. *Hartman,* 111 Fed. 96, 98:

> "* * * hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss * * *. There is a notable exception to this general rule. It is that the loss of profits from the destruction or interruption of an *established business* may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a *long-established business* generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly income he derived from it *for a long time before,* and for the time during the interruption of which he complained" (Italics ours).

In other words, it is only the past profits of an old and established business, with relatively stable and uniform income and expenses over a long period of years, that can form a fair basis for estimating what profits such a business will make in the future; but to attempt to say what a talking motion picture theatre, exploiting a new invention, will make in the future, on the basis of what it made during its first two years, under exceptional conditions and virtually without competition, is nothing but the wildest speculation.

It is only necessary to glance at the tabulation of the box office receipts for these theatres during the period in question (Appendices "A" and "B", annexed hereto), to see that the fluctuations in this business were so extreme that the rule of estimating future profits of a long-established business upon the basis of past profits is wholly inapplicable. As said in the "Restatement of the Law of Contracts" by the American Law Institute (Vol. I, §331, p. 517):

> "If the defendant's breach has prevented the plaintiff from carrying on a well-established business, the amount of profits thereby prevented is often capable of proof with reasonable certainty. On the basis of its past history, a reasonable prediction can be made as to its future. *This may not be the case, however, if the business is one that is subject to great fluctuations either in volume or in the cost of production or the value of the product.*" (Italics ours.)

If confirmation were needed that the jury should not have been permitted to indulge its imagination as to the amount of defendant's lost profits, without the guidance of any reliable evidence of those profits, it is readily found

in the amazingly confused result reached by the jury. Although the only figures of lost profits given by the defendant showed a much larger loss at Ketchikan than at Juneau, the jury's verdict gave a much larger amount for lost profits at Juneau than at Ketchikan! Defendant's figures for his average monthly loss of profits at Ketchikan were $2,188.22 (p. 792); his figures for average monthly loss of profits at Juneau were $1,354.13 (p. 796); thus making a total loss of profits at Juneau of $28,888.10 (p. 796) and a total loss of profits at Ketchikan of $44,952.26 (p. 792). Yet the jury, by some wholly mysterious process of calculation based on no evidence whatsoever, arrived at the figure of $19,440 for lost profits at Juneau (p. 113) and $12,320 for lost profits at Ketchikan (p. 114).

Could any case, better than the case at bar, illustrate the injustice of allowing a jury to mulct a party in large damages based, not on facts and reason, but on speculation and conjecture?

## Conclusion.

**Because of the serious errors committed by the Trial Court, the judgment appealed from should be reversed.**

Respectfully submitted,

R. E. Robertson,
Attorney for Plaintiff-Appellant.

John H. Ray,
H. H. Breland,
Of Counsel.

## Appendix "A".

### BOX OFFICE RECEIPTS—JUNEAU.

| | *1929* | *1930* | *1931* | *1932* | *1933* | *1934* |
|---|---|---|---|---|---|---|
| Jan. | ..... | $4,633.35 | $3,347.41 | $2,257.17 | $2,035.70 | $1,727.05 |
| Feb. | ..... | 3,757.91 | 3,078.68 | 2,468.16 | 2,071.55 | 1,732.80 |
| Mar. | ..... | 3,674.55 | 3,059.95 | 2,075.55 | 1,832.50 | 1,994.60 |
| Apr. | ..... | 4,991.35 | 3,042.83 | 2,228.26 | 1,759.69 | 2,287.20 |
| May | ..... | 4,324.10 | 2,797.23 | 2,119.23 | 1,131.40 | 2,229.30 |
| June | $4,025.00 | 4,219.28 | 2,656.35 | 2,337.95 | 451.05 | ..... |
| July | 6,308.40 | 4,295.50 | 2,813.72 | 1,984.28 | 1,580.25 | ..... |
| Aug. | 5,547.15 | 4,458.06 | 3,151.50 | 2,431.46 | 1,472.85 | ..... |
| Sept. | 5,393.35 | 4,955.15 | 2,765.06 | 2,044.95 | 1,793.80 | ..... |
| Oct. | 5,501.71 | 4,861.79 | 2,828.10 | 2,857.10 | 1,605.45 | ..... |
| Nov. | 6,068.02 | 3,907.90 | 2,873.25 | 2,244.60 | 1,899.15 | 2,317.95 |
| Dec. | 4,985.99 | 5,517.55 | 2,458.74 | 2,330.75 | 1,297.10 | 2,461.40 |

## Appendix "B".

### BOX OFFICE RECEIPTS—KETCHIKAN.

| | *1929* | *1930* | *1931* | *1932* | *1933* | *1934* |
|---|---|---|---|---|---|---|
| Jan. | ..... | $4,462.30 | $3,290.35 | $ 977.84 | $1,004.68 | $ 876.30 |
| Feb. | ..... | 3,942.70 | 3,059.05 | 1,428.90 | 988.30 | 1,258.61 |
| Mar. | ..... | 4,310.35 | 3,422.00 | 1,414.75 | 695.05 | 2,811.61 |
| Apr. | ..... | 4,727.70 | 2,987.15 | 1,491.10 | 634.79 | 2,321.30 |
| May | ..... | 4,848.35 | 2,741.60 | 1,193.90 | 85.60 | 2,696.05 |
| June | ..... | 4,504.05 | 2,877.05 | 733.35 | 2.50 | ..... |
| July | $6,234.07 | 4,821.25 | 2,957.80 | 1,047.63 | 1,142.78 | ..... |
| Aug. | 7,519.70 | 4,365.35 | 2,853.20 | 1,192.67 | 988.23 | ..... |
| Sept. | 6,682.75 | 5,625.75 | 2,966.30 | 1,387.20 | 2,397.82 | ..... |
| Oct. | 7,209.70 | 4,613.00 | 2,607.40 | 1,784.13 | 2,369.90 | ..... |
| Nov. | 5,705.85 | 3,741.25 | 2,312.00 | 1,244.10 | 1,858.30 | 3,681.15 |
| Dec. | 4,314.20 | 2,813.15 | 1,438.35 | 1,034.95 | 666.71 | 3,170.76 |

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The above figures are compiled from defendant's exhibits. Plaintiff's equipment was installed at Juneau on May 20, 1929 and at Ketchikan in the middle of June, 1929 (pp. 318-19). Plaintiff's equipment was replevied at Juneau on April 20, 1931 (p. 314) and at Ketchikan on April 28, 1931 (p. 311).